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IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

v.

PHILLIP ACUFF, CHARLES W. BROWN, WILLIAM CARLISLE, JAMES M. CARPENTER, LAMAR CLARK, C.H. COBB, WILLIAM R. JOHNSTON, DAN C. JONES, CLYTHUS MASON, JOHNNY W. MITCHELL, YORK SIT, and CHARLES R. WARREN,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When an employee covered by the Federal Employers' Liability Act ("FELA") settles a claim for occupational injury against an employer, does Section 5 of FELA, 45 U.S.C. § 55, impose special restrictions on the freedom of the parties to include in the settlement a release of other potential occupational injury claims, or do "the releases of [FELA] employees stand on the same basis as the releases of others," as this Court stated in *Callen v. Pennsylvania Railroad*, 332 U.S. 625, 630 (1948)?

2. If Section 5 of FELA does impose special restrictions on such releases, as the Mississippi Supreme Court held, which among the various competing standards adopted by the federal courts of appeals and state appellate courts, or other possible standards, governs the validity of those releases?*

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* ICRR presents, through the undersigned counsel, the same questions, in a petition for review of a similar decision of the Mississippi Supreme Court, in *Illinois Central Railroad v. McDaniel,* No. 06-763, *petition for cert. filed,* No. 06-763 (U.S. Nov. 29, 2006). ICRR addresses the similarities and differences between the two cases at various points throughout this petition, and offers a suggestion as to how the Court might handle the two cases together in Part IV of the argument below.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the court below were Illinois Central Railroad Company ("ICRR"), petitioner herein, and Phillip Acuff, Charles W. Brown, William Carlisle, James M. Carpenter, Lamar Clark, C.H. Cobb, William R. Johnston, Dan C. Jones, Clythus Mason, Johnny W. Mitchell, York Sit, and Charles R. Warren, respondents herein. ICRR is not seeking review of those portions of the judgment below that relate only to Hubert Deer, Charles E. McNeil, Lester Ray Warren, Willie Woodberry, and James Expose.

RULE 29.6 STATEMENT

Petitioner is a wholly owned subsidiary of Illinois Central Corporation, which is a wholly owned subsidiary of Grand Trunk Corporation, which is a wholly owned subsidiary of Canadian National Railway Company, a publicly held corporation. No other publicly held corporation owns more than 10% of ICRR's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Illinois Central Railroad Company respectfully petitions for a writ of certiorari to review the judgment of the Mississippi Supreme Court.

OPINIONS AND ORDERS BELOW

The opinion of the Mississippi Supreme Court (Pet. App. 1a-31a) is not yet reported in Southern Reporter, Second Series, but is available from Westlaw at 2006 WL 2168122. The trial court's judgment (Pet. App. 33a-35a) and the transcript containing its bench ruling in support of that order (Pet. App. 36a-53a) are unreported.

JURISDICTION

The judgment of the Mississippi Supreme Court for which review is sought was entered on August 3, 2006. Pet. App. 1a-31a. The Mississippi Supreme Court denied a timely petition for rehearing on October 12, 2006. Pet. App. 32a. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTES OR OTHER PROVISIONS INVOLVED

This case concerns Section 5 of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 55, which is reproduced in the Appendix (Pet. App. 54a).

STATEMENT OF THE CASE

In the late 1980s and early 1990s respondents, then all employees of ICRR, settled various occupational injury claims against ICRR. As part of their settlements, they each signed a broad release, all but one of which expressly listed as released several types of potential future as well as existing occupational injury claims against ICRR. Included among the claims listed in each case was "asbestos." In the decision below, the Mississippi Supreme Court acknowledged that asbestos claims could have been contemplated when the respondents signed their releases. Pet. App. 22a, ¶ 51.[1]

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[1] The claims released in respondents' initial settlements varied, as do some of the terms included in their releases. The Carpenter release covers "all claims, losses, damages, injuries or diseases" arising from alleged exposure to asbestos or other identified environmental hazards. Pet. App. 15a-16a, ¶ 38. Similarly, most respondents, whose initial claims were for hearing loss, expressly released all hearing loss claims and other non-pending claims for occupational disease-type illness, including claims based on exposure to asbestos and several other identified occupational exposures. Pet. App. 15a, ¶ 37. The Cobb release even more broadly covers "all claims, demands, grievances, and causes of action of any nature." Pet. App. 16a, ¶ 39.

The Mississippi Supreme Court did not find dispositive the variations in either the underlying claims or in the terms of the releases settling those

Some ten or so years later, respondents joined with others as plaintiffs in a large multi-plaintiff action filed in Mississippi state court under FELA, alleging injury as a result of workplace exposure to asbestos.[2] In 2002 and in 2004, before trial, ICRR agreed with the plaintiffs in that action on a binding settlement procedure, which provided for payments conditioned on the provision by plaintiffs of certain documentation regarding their employment, medical history, and claimed injury. Pet. App. 2a-3a, 6a, ¶¶ 2, 13. In the agreements, ICRR expressly reserved the right to refuse payment on several grounds, including prior release. *See* Pet. App. 10a-11a, ¶¶ 23, 25.

Respondents sought payments under the agreements, but ICRR declined to pay them because of their release of asbestos-related claims in the prior releases. Respondents then moved to compel payments under the 2002 and 2004 agreements. The trial court ruled for respondents, Pet. App. 33a-35a, and ICRR appealed to the Mississippi Supreme Court, which affirmed, Pet. App. 1a-31a. That court held that the releases were invalid under Section 5 of FELA, which prohibits contractual "exemptions" from FELA liability of rail and maritime employers for injuries to their employees. Pet. App. 14a-22a, ¶¶ 36-51. The court deemed the releases invalid "exemptions," rather than valid releases, after reviewing two conflicting standards for making that distinction derived from prior federal court of appeals decisions—a Sixth Circuit rule that the Mississippi Supreme Court (in common with several other courts) read as requiring "a known claim

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claims. In fact, each release unambiguously encompassed potential asbestos-related occupational injury claims—most, by expressly including asbestosis as a specified risk in their enumeration of released claims; the Cobb release, by broadly covering "all" potential claims "of any nature" without exceptions. Pet. App. 16a, ¶ 39.

[2] *Eakins v. Ill. Cent. R.R.*, Civ. No. 2001-65 (Cir. Ct. Jefferson Cty., Miss.) ("*Eakins*").

for a specific injury" as a predicate for a valid release, *Babbitt v. Norfolk & W. Ry.*, 104 F.3d 89, 93 (6th Cir. 1997), and a Third Circuit rule that only potential claims for "specifically known risks" can be validly released, and only subject to complex and onerous additional requirements which must be determined by a "very fact-intensive process," *Wicker v. Consol. Rail Corp.*, 142 F.3d 690, 701 (3d Cir. 1998), *cert. denied*, 525 U.S. 1012 (1998). Pet. App. 18a-21a, ¶¶ 44-48. In contrast to the prior decision by a different panel of the Mississippi Supreme Court in another case, *Illinois Central Railroad v. McDaniel*, 2006 WL 2506739 (Miss. Aug. 31, 2006), *petition for cert. filed*, No. 06-763 (U.S. Nov. 29, 2006), which endorsed both *Babbitt* and *Wicker*, the panel in this case endorsed *Wicker*, but rejected *Babbitt* (Pet. App. 20a, ¶ 47).

The Mississippi Supreme Court recognized that "fraud or mutual mistake may be required to invalidate a release covering the particular injury being settled." Pet. App. 18a, ¶ 43 (citing *Callen v. Pa. R.R.*, 332 U.S. 625 (1948)). However, it held that under Section 5 of FELA, a prior release constitutes an invalid "exemption" as applied to a new alleged injury that was not a "specifically known risk," as defined by *Wicker*, at the time of the release, even when the injury was of a type expressly included in the release and even when the risk of that type of injury was within the general contemplation of the parties at the time of the release. Pet. App. 20l-21a, ¶¶ 47-48. The Mississippi Supreme Court cited no provision of Section 5 nor any language in this Court's decisions to support that conclusion.

The court's conclusion was based in part on the premise that when the respondents signed their releases they did not have any pending asbestos "claims" against ICRR. Pet. App. 16a, ¶ 40. The Mississippi courts did *not* deny that the releases plainly and expressly encompass potential or inchoate

subsequent claims for asbestos-related disease, and did *not* find that respondents were unaware of the risk of contracting asbestos-related disease. Indeed, all but one of the releases specifically identify asbestos-related disease as a risk for which potential claims were released.[3]

Rather, the Mississippi Supreme Court joined the Third Circuit in *Wicker* in holding that FELA subjects releases of employees' claims "to a higher standard" than applies "[u]nder general contract." Pet. App. 21a, ¶ 49. It also endorsed *Wicker*'s requirement that a release spell out the "quantity, location and duration of potential risks." Pet. App. 20a-21a, ¶ 48.[4]

The decision below conflicts with this Court's precedent. In *Callen*, this Court explained that FELA's prohibition against "exemptions" from FELA liability does not apply to "releases" of liability, because a release "is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility." 332 U.S. at 631. *Callen* held that FELA releases are subject to the "same" law as other releases, and thus are valid, absent fraud or mutual mistake. *Id.* at 630.

In the present case, the Mississippi Supreme Court expressly acknowledged that the provisions it deemed invalid under Section 5 of FELA were "releases." Pet. App. 14a-16a, 22a, ¶¶ 36-40, 51. It identified no finding of fraud or mutual mistake. Nor did it identify any plausible public policy or equitable grounds for distinguishing *Callen*. It did not rule

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[3] As detailed above, all but one of the releases expressly include asbestos-related disease in their enumeration of risks for which potential claims were being released. The exception, the Cobb release, is the most broadly phrased of all, and plainly also encompasses potential asbestos-related disease claims. *See* note 1, *supra*.

[4] The court also noted that when the plaintiffs in *Wicker* signed their releases, they had been "unaware of their injuries and the cause thereof," Pet. App. 21a, ¶ 49.

that the releases were not sufficiently clear and specific in their inclusion of claims for injuries related to asbestos exposure, and did not rule them to be ambiguous. Moreover, the alleged asbestos exposure occurred prior to the negotiation of the releases.

In this case (and in *McDaniel*), the Mississippi Supreme Court joined multiple other appellate courts in a series of recent rulings that have supplanted *Callen*'s clear "release"/"exemption" distinction with a variety of complex and conflicting restrictions on what releases, in what circumstances, will be acknowledged as valid releases rather than being deemed invalid "exemptions." Moreover, there is now a mature and acknowledged three-way split in the federal courts of appeals, with appellate courts in multiple states similarly divided, concerning when an express release of FELA claims is not a release, but instead an invalid "exemption."

First, the Sixth Circuit in *Babbitt* stated its "known claim" standard, which some courts have since read as applicable to releases contained in agreements that settle occupational injury claims. As noted, the Mississippi Supreme Court, without explanation, endorsed *Babbitt* in *McDaniel* but rejected it in this case. *Second*, the Third Circuit expressly declined in *Wicker* (with which the Mississippi Supreme Court in this case agreed (Pet. App. 20a-21a, ¶¶ 47-49)) to adopt the "known claim" standard, instead allowing releases of "specifically known risks," subject to additional onerous and complex requirements. *Third*, the Eleventh Circuit has adopted a less onerous rule, which requires only that released potential claims be for "known risks," without any further requirements. *Sea-Land Serv., Inc. v. Sellan*, 231 F.3d 848, 852 (11th Cir. 2000).

These different rules yield materially different results. Respondents did not have a "known claim for a specific [asbestos-related] injury," as the Sixth Circuit rule would

require, when they signed their releases, and the Mississippi Supreme Court also concluded that the "fact-intensive" inquiry mandated by the Third Circuit supported invalidation of the releases. But the releases plainly met the requirements of the Eleventh Circuit's test: asbestos-related injury was certainly a "known risk," which all but one of the releases specifically covered on their face (and the exception covered it by its inclusiveness).

The decision below thus meets two of this Court's established criteria for review. It conflicts with this Court's precedent, *see* SUP. CT. R. 10(c), and it also implicates and exacerbates a mature and complex division of authority among several federal courts of appeal and state courts of last resort, SUP. CT. R. 10(b).

The statutory context and practical implications of the decision below and those upon which it relied also militate in favor of review. This Court has historically been vigilant to resolve conflicts under FELA because "uniform application" of the statute "throughout the country [is] essential to effectuate its purposes." *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359, 361 (1952).[5] This acknowledged need for uniformity is accentuated by FELA's liberal venue rules, which create opportunities for forum-shopping among state and federal courts if they apply different rules. Moreover, as this

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[5] *See also S. Buffalo Ry. v. Ahern*, 344 U.S. 367, 370 (1953) (Congress "intended" FELA to be a "uniform scheme"); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244 (1942) ("[FELA] requires uniform interpretation"). Congress also addressed the importance of uniformity, with an explanation that still has force a century later:

> A Federal statute of this character will supplant the numerous State statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries instead of being subject to numerous rules will be fixed by one rule in all the States.

H.R. Rep. No. 60-1386, at 3 (1908).

case, *McDaniel,* and the prior federal court of appeals cases cited above demonstrate, the questions presented are important and recurring ones.

Uniform and clear rules are especially important in the practical context of *settlements* of FELA claims. By restoring the simple and clear *Callen* rule that validates "releases" while invalidating only "exemptions," this Court could forestall litigation seeking the judicial rewriting of thousands of settlements of FELA claims that have been entered into voluntarily in reliance on that rule. In doing so, this Court could at the same time assure railroads, other employers subject to FELA, and their employees that future settlements voluntarily entered into will be honored in accordance with their express and specific terms. Restoring *Callen* would thus facilitate and encourage the prompt and just settlement of FELA disputes, including asbestos claims that would otherwise clog the courts.

By contrast, if the Court allows the morass of competing standards for judicially invalidating releases of FELA claims to remain, new settlements will be discouraged; comprehensive settlements will be replaced with piecemeal settlements, if any; employers subject to FELA may hesitate to compensate claimants until their injuries are fully "known" or their risks are "specifically known"; old settlements will be relitigated; and forum-shopping and disputes over the application of "fact-intensive" judicially created standards for the invalidation of settlement terms will generate further litigation and transaction costs.

Accordingly, this Court should grant review so as to reestablish a clear, uniform rule governing the validity of releases in FELA settlements. ICRR invites the Court to reaffirm the rule of *Callen*, and to make clear that FELA releases are not subject to any limits beyond those applicable to all other releases. Alternatively, if the Court believes that additional limitations beyond *Callen*'s are required under

Section 5 of FELA, it should take this opportunity to resolve the circuit split by providing an authoritative articulation of those limitations, on which parties can rely in settling asbestos and other occupational exposure claims under FELA, and on which parties and the courts can rely in assessing efficiently and reliably whether such claims have been validly released.

A. Statutory Background

In 1908 Congress enacted FELA because it "was dissatisfied with the common-law duty of the master to his servant." *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 507 (1957). The traditional common law rules made it difficult for railroad workers to recover for injuries sustained on the job, and the various states applied inconsistent tort law rules. Accordingly, FELA modified the common law of the states and established a uniform national standard. For example, the Act abolished certain common-law defenses, and, in Section 5, sought to prevent employers subject to FELA from "exempting" themselves out of liability to their employees through contracts. *See* S. Rep. No. 60-460, at 2-3 (1908).[6] Thus, FELA provides, under federal law, remedies that in most other industries are matters of state workers' compensation law, with no right to seek a remedy in court. FELA now applies not only to railroad employees but to seamen and longshoremen across the country.[7]

Section 5 states that "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to *exempt itself from any liability*

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[6] As this Court recently observed, however, FELA's "remedial purpose" does not require that "every uncertainty in the Act [be interpreted] in favor of employees." *Norfolk S. Ry. v. Sorrell*, No. 05-746, slip op. at 13 (U.S. Jan. 10, 2007).

[7] *E.g., Am. Dredging Co. v. Miller*, 510 U.S. 443, 456 (1994).

created by this chapter, shall *to that extent* be void." 45 U.S.C. § 55 (emphasis added).[8] Federal law governs the validity of releases under FELA. *Dice*, 342 U.S. at 361. The party attacking a release bears the burden of showing that specific provisions of the release are invalid. *Callen*, 332 U.S. at 629-30. Section 5 was not aimed at negotiated settlements of litigation or pre-litigation claims or potential claims, and it did not address the traditional policy in favor of such settlements. Instead, it was enacted to foreclose an anticipated practice whereby railroads might insist that their employees "discharg[e] the company from liability for personal injuries" as a condition of employment. H.R. Rep. 60-1386, at 6 (1908). Section 5 was "designed to protect railroad workers and seamen from overreaching *as a condition of either obtaining or maintaining employment,*" and is not violated in the absence of such overreaching. *Sea-Land,* 231 F.3d at 851 (emphasis added).

Many FELA claims are brought and litigated in state court, as here, because while FELA claims may be brought in state court, *see* 45 U.S.C. § 56, they are generally not removable, 28 U.S.C. § 1445(a). The plaintiff in a FELA case often has a range of federal and state courts in which to sue.[9] However,

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[8] Section 1 of FELA makes "[e]very common carrier by railroad . . . liable in damages" for the injury or death of any employee employed in interstate commerce that "result[s] in whole or in part from the [railroad's] negligence." 45 U.S.C. § 51. Absent an express statutory departure, the requisite elements of a FELA cause of action are determined by the common law "'as established and applied in the federal courts.'" *Urie v. Thompson*, 337 U.S. 163, 174 (1949).

[9] The multi-state nature of employment covered by FELA means that employees may sue in federal or state courts in several states. Under FELA's liberal venue rules, plaintiffs may sue in any jurisdiction where the railroad operates. 45 U.S.C. § 56; *Boyd v. Grand Trunk W. R.R.*, 338 U.S. 263, 265 (1949). ICRR and its affiliates currently operate in 16 states in eight circuits: the First, Second, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh. These include the three circuits that have adopted

the same substantive federal law governs FELA claims in federal and state court.

B. Factual Background

This case arises out of complaints based on personal injuries allegedly sustained by respondents as a result of their exposure to asbestos while employees of ICRR. Most respondents had made prior claims against ICRR for occupational injury. These prior claims were settled with payments by ICRR and execution of releases by respondents in the late 1980s and early 1990s. As the Mississippi Supreme Court acknowledged, for all but one respondent[10] the releases expressly covered future injury claims for exposure to a variety of occupational hazards, including asbestos. Pet. App. 15a-16a, ¶¶ 37-39. Relevant language from the releases is set forth in that court's opinion. Pet. App. 15a-16a, ¶¶ 37-39.

In 2001, respondents became plaintiffs in *Eakins*, a large multi-plaintiff case filed against ICRR under FELA in state court, alleging that they had sustained asbestos-related conditions from exposure while working for ICRR. ICRR entered into an agreement establishing a settlement procedure in the *Eakins* case. The procedure provided for substantial payments to each plaintiff, on the conditions that they produced specified information and were not subject to certain defenses, including prior release. When ICRR declined to make the settlement payments to certain plaintiffs in *Eakins*, including respondents, on the ground of prior release, they filed a motion in the Mississippi trial court to enforce the agreement. *See* Pet. App. 2a-3a, ¶¶ 2-3.

As to the prior release issue, respondents asserted that their releases were invalid because, when they signed their

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divergent positions on the questions presented. Other railroads also operate in multiple circuits and states.

[10] *See* note 1, *supra* (respondent Cobb).

releases, they had not been aware that they had claims for the occupational exposure identified in the releases they had signed and provided to ICRR. The trial court held that the releases executed by respondents did not bar their recovery under the *Eakins* settlement procedure. Pet. App. 33a-35a, 45a-47a; *see id.* at 3a-4a, ¶¶ 3-7. The court made no finding of any fraud by ICRR or mutual mistake.

C. Proceedings in the Court Below

From the judgment in *Eakins*, ICRR appealed to the Mississippi Supreme Court and challenged the trial court's judgment in favor of respondents on the release issue (and rulings for respondents and other plaintiffs on other issues not involved here).

The Mississippi Supreme Court rejected what it understood to be the Sixth Circuit's "known claim" test in *Babbitt*. Pet. App. 20a, ¶ 47. The decision endorsed the Third Circuit's "specifically known risk" test in *Wicker*, which had also rejected *Babbitt*'s "known claim" test. The Mississippi Supreme Court agreed with *Wicker*'s observation that the issue entails a "'fact-intensive process.'" Pet. App. 22a, ¶ 50 (quoting *Wicker*, 142 F.3d at 701). It observed that *Wicker* had "criticized" the "'laundry list/boilerplate'" type of release, Pet. App. 22a, ¶ 51, and, characterizing respondents' releases here as of that type, upheld the trial court's failure to find that, despite the explicit language of those releases, potential asbestos claims were contemplated by the respondents (Pet. App. 22a, ¶ 51). The opinion did not identify or suggest any fraud by ICRR in securing the releases, or any mutual mistake.[11]

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[11] In a parallel litigation the same trial court had made similar rulings. ICRR's appeal in that case was heard by a different panel of the Mississippi Supreme Court in *Illinois Central Railroad v. McDaniel*, which endorsed the "known claim" test derived from *Babbitt*, as well as the fact-

REASONS FOR GRANTING THE PETITION

"[T]he scope of § 5 is of fundamental importance in the administration of [FELA]." *Duncan v. Thompson*, 315 U.S. 1, 5 (1942). The decision below directly conflicts with this Court's precedent applying Section 5 to FELA settlement agreements, and exacerbates an already mature and acknowledged conflict in both the federal circuits and state appellate courts. This Court's review is necessary to clarify the validity of a general release, made as part of an agreement settling FELA claims, in the absence of any fraud or mutual mistake. In *Callen*, this Court held that such a release does not offend FELA's prohibition against liability "exemptions," and is enforceable on the "same" basis as other releases, without any limitations as to "known claims" or "specifically known risks." ICRR respectfully urges the Court to reaffirm that holding, from which the decision below and other recent decisions have strayed.

The question presented is important not only to the many FELA cases brought in state and federal court each year, but also to the far larger volume of FELA claims that are resolved by negotiation and agreement and do not end up in court. Settlements provide compensation promptly, fairly, and efficiently by voluntarily allocating risks in circumstances of uncertainty. Allowing railroads, other employers subject to FELA, and their employees to enter into fully enforceable

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intensive "specifically known risk" test of *Wicker*. 2006 WL 2506739, at *7-*9 (Miss. Aug. 31, 2006). ICRR filed a petition for certiorari in *McDaniel* on November 29, 2006 (No. 06-763). A similar issue has arisen in other litigation, where a Mississippi trial court recently ruled, citing the Mississippi Supreme Court's decision in this case, that a prior explicit release of claims associated with asbestos exposure, negotiated in connection with an injury unrelated to asbestos exposure, is not a bar to a later claim for asbestos-related injury. *McElhenny v. Ill. Cent. R.R.*, Civ. No. 2002-495 (Cir. Ct. Holmes Cty., Miss. Nov. 17, 2006), *motion for clarification filed* (Cir. Ct. Holmes Cty., Miss. Dec. 12, 2006).

settlements before risks, injuries, and/or claims are fully "known" is consistent with FELA's goals of fair compensation for alleged workplace injuries. By invalidating the releases in this case, the state supreme court has called into question thousands of FELA settlements reached with employees that include the release of future asbestos or other occupational hazard claims, and it has injected substantial uncertainty into the settlement process. In sum, this Court's review of the questions presented here is warranted.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENT ESTABLISHING THE VALIDITY OF GENERAL RELEASES IN FELA SETTLEMENTS.

More than a half century ago, this Court established the validity of general releases under Section 5 of FELA for future, unaccrued causes of action. In *Callen*, the Court explained that a general release of future claims executed after an alleged wrongful act is committed does not offend FELA's prohibition of liability exemptions. 332 U.S. at 630-31. In the decision below, the Mississippi Supreme Court misconstrued *Callen*.

In *Callen*, the plaintiff-employee sustained a back injury while working and entered into a settlement agreement with the employer-railroad. *Id.* at 626-27. For cash received the plaintiff executed a general release—in what could fairly be described as "boilerplate" terms—of his claims arising out of the accident that caused the back injury (for "'all claims and demands which [plaintiff] ha[s] or can or may have against [the railroad]'"). *Id.* at 626. Significantly, at the time the plaintiff executed the general release, he had not been diagnosed with, and was unaware that he had sustained, a permanent back injury. *Id.* at 627.

Subsequently, when the plaintiff sought damages under FELA for a severe and permanent back injury, this Court

upheld the general release as a bar to that claim. In rejecting the plaintiff's argument that the release violated Section 5 of FELA, the Court stated:

> It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.

Id. at 631. Moreover, the Court explained that "until the *Congress* changes the statutory plan, the *releases of railroad employees stand on the same basis as the releases of others.*" *Id.* at 630 (emphasis added). The fact that the employee did not know he had a permanent back injury was irrelevant to the validity of the release. Hence *Callen* makes clear that, where there is an injury claim, and a bona fide compromise of that claim—including a release of future claims known or unknown—the release is valid under FELA, absent fraud or mutual mistake.

Here, most of the respondents had made specific claims for damages arising from hazards to which they had been exposed on the job. With one exception,[12] the express terms of their releases specifically identified asbestos-related disease as a risk to which they were releasing present and future claims. For significant consideration, they then executed a bona fide compromise of their claims, which included an express release of claims concerning asbestos exposure. There has been no finding that the releases were in any way fraudulent or based on any mutual mistake. The ruling below is, therefore, irreconcilable with *Callen*, and should be reviewed by this Court.

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[12] As noted above, the exception, respondent Cobb's release, was also amply broad to encompass potential asbestos-related claims. *See* note 1, *supra*.

II. THE DECISION BELOW EXACERBATES A MATURE AND ACKNOWLEDGED CONFLICT AMONG FEDERAL COURTS OF APPEAL AND STATE APPELLATE COURTS CONCERNING THE VALIDITY OF FELA RELEASES.

The ruling below also merits this Court's review for an independent but related reason. It exacerbates a well-developed conflict among the various lower appellate courts that have abandoned this Court's bright-line distinction between "releases" and "exemptions" in *Callen*, and that have then proceeded to articulate various inconsistent criteria for when a release will be deemed a prohibited "exemption." These decisions have splintered in at least three different directions.

A. The "Known Claim for a Specific Injury" Test

In *Babbitt*, the Sixth Circuit addressed a release by a railroad employee who accepted a "buy-out" or severance from the company. 104 F.3d at 90. The plaintiff-employee signed an agreement releasing the railroad from any and all claims the employee may have had against the company, known and unknown. Subsequently, the employee brought a FELA claim for hearing loss. *Id.*

The Sixth Circuit stated a bright-line rule for upholding releases under Section 5 of FELA: "[t]o be valid, a release must reflect a bargained-for settlement of a *known claim for a specific injury*, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him." *Id.* at 93 (emphasis added). In reversing summary judgment that had been granted to the railroad by the court below in light of the release in the severance agreement that was before it, the Sixth Circuit did not go so far as to mandate that, even if there is a settlement of a known claim that provides a sufficient predicate for a release, the scope of the release must

be limited to known claims for specific injuries. However, subsequent cases, including the decision below, have read *Babbitt* as stating a bright-line rule that not only requires a known claim as a *predicate* for a release, but also limits the *scope* of releases to known claims. This bright-line rule directly conflicts with *Callen* by severely limiting the scope of liability releases that can be contained in agreements to settle existing or potential FELA claims.

In the present case, the Mississippi Supreme Court rejected *Babbitt* and its "known claim" test, Pet. App. 20a, ¶ 47, while relying on the concededly different test adopted by the Third Circuit in *Wicker, see id.* Other appellate courts have, however, followed *Babbitt* and applied its "known claim" test to occupational injury settlement agreements. *E.g.*, *Stephens v. Ala. State Docks Terminal Ry.*, 723 So. 2d 83, 86-87 (Ala. Civ. App. 1998) (relying on *Babbitt* in finding that a post-injury general release does not apply to a new injury or aggravation of an old injury); *Anderson v. A.C. & S., Inc.*, 797 N.E.2d 537, 540, 543-44 (Ohio Ct. App. 2003) (relying on *Babbitt* to hold that release of liability for known asbestosis did not extend to mesothelioma that subsequently developed as a result of plaintiff's exposure to asbestos, even though specifically identified in release), *appeal not allowed,* 804 N.E.2d 40 (Ohio 2004), *cert. denied,* 543 U.S. 926 (2004); *Knoth v. Ill. Cent. R.R.*, No. 2005-CA-001882-MR, 2006 WL 1510782, at *1 (Ky. Ct. App. June 2, 2006) (applying *Babbitt* "known claim" rule); *McDaniel,* 2006 WL 2506739, at *7-*9, ¶¶ 27-29 (purporting to apply both *Babbitt* "known claim" test and *Wicker* version of "known risk" test).

B. The Basic "Known Risk" Test

Other appellate courts have expressly rejected the "known claim" rule, beginning with the Third Circuit in *Wicker.* Although *Wicker* led the way with its "known risk" test, we first address the simpler "known risk" test later propounded by the Eleventh Circuit before discussing the more complex

and onerous "specifically known risk" test adopted in *Wicker*, a variant of which was applied in the decision below.

In *Sea-Land,* the Eleventh Circuit upheld a post-injury settlement release given by a seaman under FELA. The court refused to apply the *Babbitt* test, and instead applied the basic "known risk" criterion articulated by the Third Circuit in *Wicker*, but without the additional evidentiary requirements imposed by the Third Circuit and on which the Mississippi Supreme Court relied in the present case. The Eleventh Circuit held:

> "a release does not violate § 5 [of FELA] provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those risks which are known to the parties at the time the release is signed."

Sea-Land, 231 F.3d at 852 (quoting *Wicker,* 142 F.3d at 701).

The Mississippi Supreme Court's decision in the present case plainly conflicts with that standard, since asbestos-related risks indisputably were "known" at the time of the releases: they were expressly included in all but one of the releases. *See* notes 1, 3, *supra.* Other courts have, however, joined the Eleventh Circuit in applying the "known risk" test without additional onerous requirements. *E.g., Loyal v. Norfolk S. Corp.*, 507 S.E.2d 499, 503-04 (Ga. Ct. App. 1998) (broad awareness within the railroad industry of the risk at issue, with cases "legion all over the country" when release was signed); *see also Aswad v. Norfolk S. Ry.*, No. 04-2536, 2006 WL 1063297, at *17, *19 (Va. Cir. Ct. Apr. 18, 2006) (rejecting *Babbitt* and following *Wicker*'s "known risk" standard "as modified by" *Loyal* to recognize that risk may be "known," and liability relating to that risk may validly be released, without risk being specifically identified in release; requiring proof that plaintiff was unaware of and could not "foresee" risk of silicosis to invalidate general release given with respect to subsequent silicosis claim).

C. The Fact-Intensive "Specifically Known Risk" Test

In *Wicker*, plaintiff-employees, who had previously signed general releases as part of injury claim settlements, brought suits alleging claims for new injuries. The Third Circuit observed that "the proper application and reach of § 5 remains unclear," 142 F.3d at 698, noting that "lower courts that have addressed this issue have disagreed on the proper interpretation of § 5," *id.* at 699. It stated that, "[a]lthough the Supreme Court in *Callen* refused to void the releases executed in compromise of an employee's claims, the Court has not had occasion to explain how wide a net its ruling casts." *Id.* at 698.

The *Wicker* court did not succeed in clarifying the issue. At the same time as it created a circuit split by rejecting the Sixth Circuit's rule, the Third Circuit promulgated a complex rule of its own mandating a "fact-intensive process" of inquiry in order to determine whether a settlement agreement that involves no fraud, mutual mistake or offense to public policy should be enforced in accordance with its express terms. *Id.* at 701.

Wicker held that a FELA plaintiff may release future claims that cover "specifically known risks" even if "there is no present manifestation of injury," explaining that, "[w]hile the elusiveness of any such determination might counsel in favor of a bright-line rule such as the Sixth Circuit adopted in *Babbitt*, we decline to adopt one here." *Id.* The Third Circuit explained that the Sixth Circuit's rule was inimical to the interests of both employee and employer. It reasoned:

> [I]t is entirely conceivable that both employee and employer could fully comprehend future risks and potential liabilities and, for different reasons, want an immediate and permanent settlement. The employer may desire to quantify and limit its future liabilities and the employee may desire an immediate settlement rather

> than waiting to see if injuries develop in the future. To put it another way, the parties may want to settle controversies about potential liability and damages related to known risks even if there is no present manifestation of injury.

Id. at 700-01.

As a result, the Third Circuit held that a release does not violate Section 5 "provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those *risks* which are *known* to the parties at the time the release is signed." *Id.* at 701 (emphasis added).

However, citing no statutory basis in Section 5 or elsewhere, the Court of Appeals went on, as if acting as a legislature or regulatory agency, to add an extensive "proviso" about the enforceability of a FELA release. *Id.* The Third Circuit specified that a FELA release should "chronicle" the scope and duration of known risks by "spell[ing] out the quantity, location and duration of potential risks to which the employee has been exposed." *Id.* Yet, even such detailed specificity, with the burdens it imposes on an employer, would at best only provide the employer "strong evidence" in support of a release defense. *Id.* Thus, the *Wicker* standard virtually assures that a measure intended to avoid litigation will itself invite disputes and require litigation to be effective. There is no indication that this is what Congress intended in Section 5[13] or what this Court intended in *Callen*. Indeed, the Third Circuit acknowledged that the *Wicker* standard, which the Mississippi Supreme Court endorsed here, is a "more difficult . . . standard for railroad employers than is typical in non-FELA situations." *Id.* Yet it made no attempt to recon-

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[13] If Congress had wanted to do more to regulate FELA releases, as *Wicker* does, it could easily have done so, as it has with respect to releases under other employment laws, by imposing further limitations in FELA. *E.g.*, *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998) (federal statute imposed specific limits on waiver of claims by employees).

cile that more restrictive standard with this Court's ruling in *Callen* that, unless Congress amends FELA, releases of railroad employees "*stand on the same basis as the releases of others*." 332 U.S. at 630 (emphasis added).

The Third Circuit also commented with disfavor that the releases at issue in *Wicker* involved "boilerplate" provisions including a "laundry list" of known risks to which the railroad employees may have been exposed. In endorsing *Wicker*'s "legislative" ruling, the decision below relies heavily on its language disparaging "boilerplate" and "laundry lists," *i.e.*, general releases that specifically identify and list as released multiple known risks associated with the workplace to which the employee may have been exposed. Pet. App. 19a-20a, 22a, ¶¶ 46, 51.

Whether absolute or presumptive, this prohibition on general releases of FELA claims is highly significant and troublesome. *Sea-Land* upheld a "general release," 231 F.3d at 850, and this Court in *Callen* upheld a release of "'all claims and demands which I have or can or may have against the said Pennsylvania Railroad Co. for or by reason of personal injuries sustained by me' at the time and place involved in the suit," 332 U.S. at 626-27. Indeed, most of the releases in the present case are in some respects less "general" than those in *Callen* and *Sea-Land*, insofar as they enumerate a list of particular risks, including the risk of disease due to asbestos exposure, rather than purporting to encompass unidentified occupational injury risks. Moreover, general releases serve important practical functions that limited piecemeal releases cannot fulfill. By proposing a "standard" or "form" draft release that lists multiple particular risks, the employer alerts employees to known risks that are apparent to the employer based on its past experience and

knowledge of the workplace.[14] The use of standard or "boilerplate" language also fosters efficiency and consistency in contracts, including the settlement of recurring actual and potential occupational claims. *See generally, e.g.*, Symposium, *"Boilerplate": Foundations of Market Contracts*, 104 MICH. L. REV. 821 (2006).[15] This is particularly important with FELA, under which federal and state courts, rather than any administrative agency, are responsible for resolving workplace injury claims by rail and other employees covered by FELA.

Most importantly, general releases enable the parties to achieve a comprehensive settlement of claims, whereas piecemeal releases have less value in avoiding future litigation because they leave open the potential for unresolved claims and for litigation regarding the scope of the claims resolved. Because general releases are more valuable to actual or potential defendants than piecemeal releases, they may result in more compensation for claimants. *See Wicker*, 142 F.3d at 695 (finding that employees who sign general releases tend to receive larger settlements, and that employers are willing to

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[14] Here there was no claim that respondents did not have the opportunity to take issue with the terms of the releases, including its recitals. Nor is there any claim that ICRR refused to consider changes to proposed "boilerplate" language, which contained a useful and informative list specifically identifying known risks to which the employee was or may have been exposed, even if the employee may not previously have been aware of it. Indeed, the variations in language among the releases at issue in this case demonstrate that ICRR did agree to releases on various different sets of terms where appropriate. Moreover, here there has been no claim that respondents were not aware of the risk of asbestos-related disease due to exposure to asbestos. *See* note 16, *infra*.

[15] Loose use of the vague term "boilerplate," which can have varied meanings in different contexts, obscures significant differences. But even seemingly "one-sided" contracts can have justifications that are in the public interest. *E.g.*, L. Bebchuk & R. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006).

pay higher sums to settle claims under a general release). Settlements for general releases can also encompass and provide prompt compensation for uncertain and future claims without making the parties wait until all the details of an injury or risk are fully known. *See Loyal*, 507 S.E.2d at 502 ("Clearly, in an industry, such as the railroad industry, that has a number of known occupational risks and diseases, it is important to both the employer and employee to be able to settle potential claims regarding injuries or diseases prior to actual discovery.").

Given these virtues of general releases, it is counter-productive for the "specifically known risk" test to insist that a release "spell[] out the quantity, location and duration of potential risks to which the employee has been exposed." 142 F.3d at 701; *see also* Pet. App. 20a-21a, ¶ 48. Such insistence effectively mandates discovery as part of a settlement proposal, and invites follow-on litigation about the sufficiency and accuracy of the detailed disclosures it requires.

III. THIS COURT'S REVIEW IS NECESSARY TO RESTORE UNIFORMITY AND PREDICTABILITY TO THIS IMPORTANT AREA OF FEDERAL LAW.

It is antithetical to the "uniformity" mandate of FELA to federal and state courts (*Dice*, 342 U.S. at 361) for conflicting rulings in the lower courts on recurring issues to be left unresolved. For FELA's uniform federal law to be upheld, this Court must continue to be vigilant to address inconsistencies among the various federal and state courts from among which FELA's liberal venue rules allow plaintiffs to choose.

Uniformity is especially important with respect to contractual issues, such as the validity of releases of FELA claims. Railroads and other FELA employers will become increasingly reluctant to settle claims if they are unsure of which of a variety of differing, "fact-intensive" and complex

standards will govern efforts to enforce even clear and unambiguous comprehensive settlements, especially when some of those standards prevent the parties from freely and knowingly allocating risks until after highly detailed information about the extent of injuries or risks is established.

If settlement is deterred, and if settlements become subject to relitigation in light of uncertain standards governing their validity, everyone will suffer.[16] Employers will face heightened litigation risks and costs, employees will be unable to obtain prompt and efficient compensation by settlement, nor as much compensation, and the courts may face a deluge of new asbestos and other occupational injury cases. The inevitable result will be wasteful litigation. As of the end of 2002, about 58% of the $70 billion spent by American businesses on asbestos litigation had gone to transaction costs rather than to plaintiffs. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION (RAND Institute for Civil Justice 2005), *available at* http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf. Legal uncertainty that discourages and impairs the effectiveness of settlements can only serve to increase that percentage. As this Court recognized in *Callen,* a clear rule that upholds unambiguous settlements in the absence of fraud or mutual mistake is as necessary in this context as in other contexts, and Congress has not provided otherwise.

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[16] There is a substantial inventory of releases negotiated in the 1990s or earlier that would not likely have anticipated the novel requirements of *Babbitt* or *Wicker*. However, at the time of such releases asbestos had been well known for years as one of the risks to which railroad employees are often exposed, as FELA claims based on exposure to asbestos were already common by then. *E.g., In re FELA Asbestos Cases*, 646 F. Supp. 610 (W.D. Va. 1985); *Schweitzer v. Consol. Rail Corp.*, 36 B.R. 469 (E.D. Pa. 1984), *rev'd*, 758 F.2d 936 (3d Cir. 1985); *Ex parte Edwards*, 460 So. 2d 855 (Ala. 1984).

The present case, and the almost simultaneous decision in *McDaniel*, exemplify and exacerbate the lack of such needed clarity in the lower courts today. In *McDaniel,* the Mississippi Supreme Court purported to endorse as "compelling" both a "known claim" rule and a "known risk" standard, despite the fact that the "known risk" standard arose from case law expressly rejecting the "known claim" rule. In both *McDaniel* and the present case, it adopted the Third Circuit's complex and onerous "specifically known risk" variant of the "known risk" standard. *McDaniel*, 2006 WL 2506739, at *7-*8, ¶¶ 27-29; Pet. App. 19a-22a, ¶¶ 46-51.

The disarray in the federal and state courts on this important issue under FELA stems from a disregard of *Callen.* There is no statutory basis for the draconian restrictions on the freedom to settle current and even specifically identified potential occupational injury claims imposed by *Babbitt, Wicker*, *McDaniel* and the decision below, and these cases ignore *Callen*'s instruction that releases of FELA claims are to be treated consistently with releases of "other" types of claim.

Given the mature and acknowledged splits in the circuits and among the states, the fundamental importance of Section 5, and the destructive effects of uncertainty upon efficient settlement of mounting asbestos-related and other FELA claims, this Court should act now to bring clarity and closure to the standards that apply to releases under FELA.

IV. ICRR RESPECTFULLY SUGGESTS THAT THIS CASE AND *MCDANIEL* SHOULD BE ADDRESSED, AND HEARD, TOGETHER

As noted above (*supra*, at i n.*), and as anticipated in ICRR's petition in *McDaniel,* No. 06-763 (Pet. at 11 n.8), this case presents the same questions, upon review of a decision by the same court, as *McDaniel.* ICRR believes that in both cases the Court should grant the petition for certiorari, reaffirm, consistent with *Callen*, that Section 5 of FELA imposes

no special restrictions on the validity of general releases of FELA claims, and reverse the decision of the Mississippi Supreme Court. ICRR therefore respectfully suggests that the Court consider the two petitions in tandem.

The Court could grant certiorari in one case and hold the other petition, with a view to granting, vacating and reversing in the latter case if it rules for ICRR in the former. There are, however, some differences between the two cases. They involve four different forms of release (three in this case and one in *McDaniel*), and two different appellate opinions, with somewhat different reasoning. Reviewing the cases together could provide the Court a richer context in which to consider and resolve the questions presented than either would separately. ICRR therefore respectfully suggests that the Court grant certiorari in both *McDaniel* and *Acuff*, with a view to scheduling them for a consolidated argument.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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